IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARL RANDALL,	§	
	§	No. 44, 2006
Defendant Below,	§	
Appellant,	§	Court Below: Family Court of the
	§	State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	No. 0501019648
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: July 5, 2006
Decided: August 21, 2006

Before **STEELE**, Chief Justice, **JACOBS** and **RIDGELY**, Justices.

O R D E R

This 21st day of August 2006, upon consideration of the briefs of the parties, it appears to the Court that:

(1) Appellant Karl Randall[1] appeals his juvenile delinquency adjudication in the Family Court of rape in the fourth degree. Randall claims that the Family Court erred in admitting the victim's out-of-court statements in violation of the "tender years" statute and in violation of his confrontation clause rights under the United States and Delaware Constitutions. We find no merit in his claim and affirm.

[1] All family members' names have been converted to pseudonyms, in addition to the parties' use of a pseudonym to refer to the respondent pursuant to the provisions of Del. Supr. Ct. R. 7(d).

(2) At the time of the incident, Randall was fourteen years old. Felicia was Randall's four-year-old cousin. On or about January 17, 2005, Felicia complained of pain to her mother, showed signs of vaginal swelling, and was taken to the hospital. There Karen Rollo, an emergency department nurse and sexual assault forensic nurse examiner, examined and questioned Felicia. Felicia told Rollo that Karl had played a game with her and put "his hand and fingers on my cookie," her euphemism for vagina. Rollo described the swelling as consistent with sexual abuse.

(3) Eight days later, Felicia's mother took her to the Child Advocacy Center at A.I. duPont Hospital. A forensic interviewer from the Center met with Felicia and videotaped the interview. Wilmington police detective Ronald Mullin observed this interview from an adjacent room through a closed-circuit feed. Felicia again disclosed that Randall had digitally penetrated her vagina and described the event as she had to Rollo in the prior week. Subsequently, Randall was arrested and charged with fourth degree rape.

(4) At the trial, Felicia testified that Randall did something to her but did not remember what he did. The trial judge noted that when questioned on these points, Felicia clearly was unresponsive and was "avoiding eye contact and looking down and picking with her fingers at her sweater." The prosecutor then interrupted Felicia's testimony and introduced the videotaped interview into

evidence through Detective Mullin and played it for the court. Randall made timely objections to the introduction of the tape, but the trial judge rejected them. The State then recalled the victim but was unable to get her to elaborate further on the videotape or the statement. Randall had the opportunity to cross-examine Felicia but chose not to question her.

(5) The trial judge admitted the tape under Section 3513(b)(2)a.7 of the "tender years" statute[2] after determining that the out-of-court statement bore "particular guarantees of trustworthiness"[3] and stating its basis for the record. The trial judge found there was no known motive for her to falsify her statement, her terminology was age appropriate, the statement was videotaped, the questions were not improperly leading, and defendant had the opportunity to commit the alleged act. After considering all the evidence, the trial judge found Randall delinquent of fourth degree rape, ordered him to have no contact with any child under twelve years, and to register as a Tier 2 sex offender.

(6) On appeal, Randall claims that the victim's out-of-court statements were improperly admitted. First, he claims that the State did not properly lay the

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[2] 11 Del. C. § 3513(b)(2)a.7, b (2001).

> "An out-of-court statement may be admitted as provided in subsection (a) of this section if… [t]he child is found by the court to be unavailable to testify [because of t]he child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason… [and t]he child's out-of-court statement is shown to possess particularized guarantees of trustworthiness."

[3] Section 3507(e) provides the court with a non-exhaustive list of factors it may consider in making its determination under 3507(b)(2).

foundation to introduce the tape under 11 *Del. C.* § 3507 or, in the alternative, that they were not timely under 11 *Del. C.* § 3513. Second, he argues that the admission of these statements violated his confrontation rights under both the U.S. and Delaware Constitutions. Third, he claims the videotape did not have a sufficient evidentiary foundation.

(7) We review rulings on the admission of evidence for abuse of discretion.[4] An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice.[5] To the extent that the evidentiary ruling triggers an alleged constitutional violation, we review it *de novo*.[6] We therefore review *de novo* Randall's contention that his constitutional confrontation rights were violated.

(8) Randall's first claim is that the admission of Felicia's videotaped out-of-court statement violates the foundational requirements of Sections 3507 and 3513. Although the state initially sought to introduce the statement for "3507 purposes," the trial judge ultimately admitted it under Section 3513 and did not decide whether it was also admissible under Section 3507.

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[4] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (cited by *Randolph v. State*, 878 A.2d 461 (Del. 2005) (Table)).
[5] *Lilly*, 649 A.2d at 1059 (citations and internal quotations omitted).
[6] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006) (citing *Hall v. State*, 788 A.2d 118, 123 (Del. 2001)).

(9) If Felicia's statement is not admissible under Section 3507, Randall contends that the court erred by admitting it in the alternative under Section 3513. The State did not expressly invoke Section 3513 and inform the defense of its intention to offer the statement in advance of the proceeding pursuant to that Section. Regardless, the requirements of Section 3513 do not require its express invocation for admissibility. Only notice of the statement is required, and that was provided in this case.

(10) Section 3513(b), provides a court with two alternative means to admit hearsay statements as substantive evidence. Subsection (b)(1) allows hearsay when "[t]he child is present and the child's testimony touches upon the event and is subject to cross-examination rendering such prior statement admissible under § 3507 of this title."[7] Subsections 3513(b)(2)a, (b)(2)b, (c), (d), (e), and (f) provide an alternative procedure.[8]

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[7] 11 Del. C. § 3513 (b)(1).

[8] 11 Del. C. § 3513.

(b)(2)

a. The child is found by the court to be unavailable to testify on any of these grounds:

1. The child's death;
2. The child's absence from the jurisdiction;
3. The child's total failure of memory;
4. The child's persistent refusal to testify despite judicial requests to do so;
5. The child's physical or mental disability;
6. The existence of a privilege involving the child;
7. The child's incompetency, including the child's inability to communicate about the offense because of fear or a similar reason; or
8. Substantial likelihood that the child would suffer severe emotional trauma from testifying at the proceeding or by means of a videotaped deposition or closed-circuit television; and

(11) The trial judge determined Felicia's out-of-court statement admissible under the second alternative, after deeming the victim to be unavailable under Subsection (b)(2)a.7 due to her incompetency, and supporting its decision with findings on the record. Trial judges generally possess wide discretion in deciding the admissibility of evidence because of their unique position to evaluate and

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b. The child's out-of-court statement is shown to possess particularized guarantees of trustworthiness.

(c) A finding of unavailability under subsection (b)(2)a.8. of this section must be supported by expert testimony.

(d) The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

(e) In determining whether a statement possesses particularized guarantees of trustworthiness under subsection (b)(2) of this section, the court may consider, but is not limited to, the following factors:

(1) The child's personal knowledge of the event;

(2) The age and maturity of the child;

(3) Certainty that the statement was made, including the credibility of the person testifying about the statement;

(4) Any apparent motive the child may have to falsify or distort the event, including bias, corruption or coercion;

(5) The timing of the child's statement;

(6) Whether more than 1 person heard the statement;

(7) Whether the child was suffering pain or distress when making the statement;

(8) The nature and duration of any alleged abuse;

(9) Whether the child's young age makes it unlikely that the child fabricated a statement that represents a graphic, detailed account beyond the child's knowledge and experience;

(10) Whether the statement has a "ring of verity," has internal consistency or coherence and uses terminology appropriate to the child's age;

(11) Whether the statement is spontaneous or directly responsive to questions;

(12) Whether the statement is suggestive due to improperly leading questions;

(13) Whether extrinsic evidence exists to show the defendant's opportunity to commit the act complained of in the child's statement.

(f) The court shall support with findings on the record any rulings pertaining to the child's unavailability and the trustworthiness of the out-of-court statement.

balance the probative and prejudicial aspects of the evidence.[9] We conclude that the Family Court acted within its discretion when it ruled that Felicia was unavailability due to her incompetency.

(12) Under § 3513(d),

> The proponent of the statement must inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the adverse party with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered.

Randall argues that the timing of the Court's Section 3513 analysis hindered his defense strategy, and but for the timing of this analysis, his trial tactics would have been different. Nothing in the record suggests Randall was unaware of the victim's videotaped statement or of the State's intention to use it. Randall had notice of the videotaped statement and its content. Notice is all that Subsection (d) requires.[10] The State informed him of its intention to offer Felicia's statement and its content sufficiently in advance of the proceeding to afford him a fair opportunity to prepare a response to the statement at trial. Randall has not shown that Felicia's statement was admitted without a proper foundation under Section 3513.

(13) Further, the Family Court did not abuse its discretion in not conducting the Section 3513 analysis until Randall moved for judgment of

[9] *Smith v. State*, 560 A.2d 1004, 1007 (Del. 1989).
[10] *See Thomas v. State*, 725 A.2d 424, 430-31 (Del. 1999).

acquittal. Even accepting *arguendo* that the citation of Section 3513 was untimely, Randall has not met his burden to show that the result would have changed had the Family Court applied Section 3513 at the time the State presented the videotape, or even at an *in limine* hearing. Accordingly, we find no merit to Randall's first claim.

(14) Randall's second claim is that his Sixth Amendment right to confrontation was violated based on the United States Supreme Court's decision in *Crawford v. Washington.*[11] He also cites Article I, Section VII of the Delaware Constitution.

(15) Under the Confrontation Clauses of the United States and Delaware Constitutions, the accused in a criminal proceeding is guaranteed the right to be confronted with the witnesses against him.[12] This guarantee provides the defendant the opportunity to cross-examine such witnesses,[13] subject to "reasonable limits where it conflicts with other trial considerations."[14] Thus, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination,

[11] 541 U.S. 36 (2004).
[12] *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Weber v. State*, 457 A.2d 674, 682 (Del. 1983).
[13] *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974); *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986). *See McGriff v. State*, 672 A.2d 1027, 1030 (Del. 1996) (finding defendant's confrontation rights violated under both constitutions when judge disallowed cross-examination after child witness testified).
[14] *Wright*, 513 A.2d at 1314.

not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[15]

(16) Randall contends that the State failed to substantiate fully the statements on the tape during direct, which prevented him from exercising any meaningful or effective cross-examination of the victim. Further, Randall argues that the out-of-court statements are testimonial and Section 3513 may conflict with *Crawford*.[16] After the victim testified on direct examination, Randall made a strategic decision to not cross-examine her. Therefore, we do not need to address the merits of this claim. One cannot make a strategic decision to not cross-examine a witness and later allege a constitutional violation occurred as a result of this very strategy.

(17) Likewise, we do not need to address Randall's argument that the out-of-court statement violates his confrontational rights under the Delaware Constitution. While our State constitution may be interpreted so as to provide greater rights to defendants,[17] this Court has held that "conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal."[18] The proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the

[15] *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original).
[16] *See State v. Snowden*, 867 A.2d 314 (Md. 2005) (reaching this issue).
[17] *Goddard v. State*, 382 A.2d 238, 240, n.4 (Del. 1977).
[18] *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005).

following non-exclusive criteria: "textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes."[19] Simply stating that the admission of the out-of-court statement under § 3513 violates Article I, Section VII, without more, is a conclusory statement, and therefore this Court does not have to reach the merits of Randall's state constitutional claim.

(18) Randall's third and final claim is that Detective Mullin could not adequately lay the foundation to introduce the videotape of the out-of-court statement. Under Delaware Rule of Evidence 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The proponent carries the burden of "authenticating the evidence by eliminating the possibility of misidentification or adulteration as a matter of reasonable probability."[20] This burden is met, among other ways, by having a witness with knowledge visually identify the evidence or by establishing a chain of custody that traces the evidence's continuous whereabouts, thereby demonstrating the identify and integrity of the evidence.[21]

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[19] *Id.*; *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999). *See also Commonwealth v. Edmunds*, 526 Pa. 374, 586 A.2d 887 (1991).
[20] *Guinn v. State*, 841 A.2d 1239, 1241 (Del. 2004); *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987).
[21] *Whitfield*, 524 A.2d at 16.

(19) The record supports the trial judge's determination that Detective Mullin watched the original interview contemporaneously through a video feed and he obtained a copy of the videotape interview. The Family Court did not abuse its discretion in finding the tape authenticated or admitting Felicia's out-of-court statement.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice